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(2)

No. 08-973

In The Supreme Court of the United States

ROBERT DAVID TOWNSEND,
Petitioner,

v.

UNIVERSITY OF ALASKA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Townsend has presented a compelling reason for this Court to grant review of the Ninth Circuit's decision rejecting federal question jurisdiction over an employee's USERRA claim against a state employer, when that decision does not directly conflict with any decision of this Court or any federal court of appeals?

2. Whether Townsend has presented a compelling reason for this Court to grant review of the Ninth Circuit's decision affirming state immunity under the 11th Amendment from an employee's USERRA claim against a state employer, when that decision does not directly conflict with any decision of this Court or any federal court of appeals?

3. Whether Townsend has waived review of the Ninth Circuit's decision rejecting individual defendant liability under USERRA, when he failed to either raise the issue in his Questions Presented or brief the issue in the body of his Petition?

PARTIES TO THE PROCEEDING

Petitioner is Robert David Townsend.

Respondents are the University of Alaska; the University of Alaska Fairbanks; Mike Setterberg; Terry Vrabec; Carolyn Chapman; Mike Hostina; and Kathleen Schedler ("University").

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 over Townsend's appeal from the Court of Appeal's September 30, 2008, mandate arising from the September 5, 2008, opinion.

STATUTES INVOLVED

This case rests on an interpretation of the jurisdictional grant in 38 U.S.C. § 4323(b)(2).

STATEMENT OF THE CASE

A. Factual background[1]

During Townsend's employment at the Power Plant of the University of Alaska Fairbanks, he joined the Alaska Air National Guard and participated in several periods of active Guard duty. The University terminated his employment on October 9, 2003, for cause. Townsend contends that the University discriminated against him because of his military status and performance of his military duty.

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[1] Because the district court dismissed the complaint on its face, this Court must assume Townsend's factual allegations to be accurate. *Bell-Atlantic Corp. v. Twombley*, 550 U.S. 544, ___, 127 S. Ct. 1955, 1964-65 (2007).

B. Proceedings below

Townsend filed suit in federal district court against the University, alleging violations of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Townsend alleged that the University terminated his employment because of his military status with the Alaska Air National Guard, in violation of USERRA. Townsend invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 and 38 U.S.C. § 4323(b)(3), which provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action."[2] The University moved to dismiss, asserting lack of subject matter jurisdiction over Townsend's USERRA claim and 11th Amendment immunity. It argued that the Act's provision that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State," 38 U.S.C. § 4323(b)(2), means that the federal district court lacks jurisdiction over a USERRA claim against a "State (as an employer)" brought by a private individual.[3]

Townsend then moved to amend his complaint to include individual supervisors as additional defendants.

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[2] Later, before the Ninth Circuit and now this Court, Townsend relied solely on federal question jurisdiction.

[3] The parties agree that the University is an arm of the State of Alaska under the 11th Amendment. Pet. at p. 5.

The district court granted the University's motion and dismissed the case for lack of jurisdiction. The court also denied leave to amend, reasoning that such an amendment would be futile because jurisdiction would still be lacking, after concluding that individual state supervisors were "the State" and thus, if suable at all, subject to state court jurisdiction.

On appeal, the Ninth Circuit affirmed, and held that (1) a federal district court lacks jurisdiction over a USERRA claim brought by an individual against a state, 543 F.3d at 482-85; (2) Congress has not abrogated the University's sovereign immunity, *id.*; and (3) USERRA does not create, expressly or implicitly, a cause of action against state employee-supervisors, *id.* at 485-87.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's opinion on the USERRA jurisdictional, immunity, and individual liability issues does not directly conflict with any decision of this Court or with that of any federal court of appeals.

On the merits of the jurisdictional issue, the Ninth Circuit properly held that the 1998 amendments to USERRA vested exclusive jurisdiction in state courts over private claims against state employers when Congress repealed earlier express grants of federal court jurisdiction and venue over such claims, and replaced them with an express grant of state court jurisdiction over such claims. Legislative history confirms that Congress did so in response to this Court's just-issued opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The federal government has recently agreed that, since the 1998 amendments

to USERRA, an individual may prosecute a private USERRA claim against a state employer only in state court.

If the Court needs to reach the immunity issue,[4] it must conclude that Congress' 1998 repeal of federal court jurisdiction and its substitution of state court jurisdiction over private USERRA actions against state employers are inconsistent with an unequivocally expressed intent to abrogate sovereign immunity. Moreover, no constitutional history or later legislative findings display state hostility to veterans' rights, prerequisites to abrogation under the War Powers Clause.

Neither Townsend's Questions Presented nor the body of his Petition addresses the availability of a private right of action under USERRA against individual supervisors. The passing reference to the issue in his Conclusion does not properly present that issue to this Court. No circuit court has recognized individual defendant liability under USERRA.

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[4] The Court generally avoids addressing constitutional issues that may be mooted by statutory interpretation. *See Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009).

REASONS TO DENY THE PETITION

A. The courts of appeal uniformly hold that district courts lack jurisdiction over private USERRA actions against state employers.

All three circuit courts that have reviewed the 1998 USERRA amendments agree that Congress thereby stripped federal courts of jurisdiction over USERRA suits by an individual against a state employer, and failed to abrogate state sovereign immunity. *Townsend v. University of Alaska*, 543 F.3d at 482-84; *McIntosh v. Partridge*, 540 F.3d 315, 320-21 (5th Cir. 2008) (only as to jurisdiction); *Velasquez v. Frapwell*, 165 F.3d 593, 593-94 (7th Cir. 1999) (*per curiam*) (only as to jurisdiction).

The federal government intervened in the Fifth Circuit matter, and successfully argued the absence of federal jurisdiction for such suits. *McIntosh v. Partridge*, 540 F.3d at 320.[5] Its position is consistent with the Labor Department's regulations implementing the amendments,[6] and associated

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[5] The Justice Department's brief is available at: http://www.usdoj.gov/crt/briefs/mcintosh.pdf (last visited Feb. 24, 2009). The Department argued that Congress, in 1998, chose not to exercise its authority under the War Powers Clause to confer district courts with jurisdiction over private USERRA suits against state employers.

[6] 20 C.F.R. § 1002.305(b) ("If an action is brought against a State by a person, the action may be brought in a State court of competent jurisdiction according to the laws of the State"). The Department issued the regulations under 38 U.S.C. § 4331(a).

commentary.[7]

Townsend's initial claim of "conflicting case-law regarding changes made to USERRA in 1998," Pet. at p. 8, later becomes a claim that "conflicting Supreme Court opinions have held that . . . "a grant of jurisdiction to state courts framed such that a plaintiff 'may' bring or maintain a suit in state court does *not* grant *exclusive* jurisdiction to the state courts." *Id.* (emph. in orig.) That rephrased argument ignores Congress' repeal in 1998 of express provisions lodging jurisdiction and venue in district courts, *infra*. Townsend, thus, fails to show a compelling reason for this Court to review these jurisdictional and immunity issues. *See* Supreme Court Rule 10(a) and (c).

B. The 1998 amendments to USERRA vest state courts with exclusive jurisdiction over private actions against state employers.

USERRA forbids employment discrimination on the basis of membership in the armed forces. 38 U.S.C. §§ 4301(a)(3), 4311(a). An employer violates USERRA

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[7] U. S. Dep't of Labor, Final Rule, USERRA Regulations, 70 Fed. Reg. at 75287 (Dec. 19, 2005) ("The United States district courts have jurisdiction over actions against a State or private employer brought by the Untied States, and actions against a private employer by a person. For actions brought by a person against a State, the action may be brought in a State court of competent jurisdiction."; U.S. Dep't of Labor, Proposed Rule, USERRA Regulations, 69 Fed. Reg. at 56280 (Sept. 20, 2004) ("the individual may file a complaint directly in the appropriate United States District Court or State court in cases involving a private sector or State employer, respectively").

if an employee's membership or obligation for service in the military is a motivating factor in an employer's adverse employment action taken against the employee, unless the employer proves it would have taken the same action in the absence of such membership or obligation. *See id.* § 4311(c)(1). To enforce its provisions, USERRA authorizes private suits for damages or injunctive relief against the employer, including a state employer. 38 U.S.C. §§ 4303(4)(A)(iii), 4323(a)(2), (b)(2), (d)(3).

Before the 1998 amendments to USERRA, the Act provided that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State employer. *See* Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3165 (1994), *amended by* Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (1998). The pre-1998 venue provision provided that "[i]n the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function." *Id.*

The Veterans Programs Enhancement Act of 1998 made substantial changes to the jurisdiction and venue provisions of USERRA. The amended jurisdictional provision now provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). The amended Act provides for federal jurisdiction over "an action against a State (as an employer) or a private employer commenced by the United States," and "an action against a private employer by a person." *Id.*

§ 4323(b)(1), (3). Where the Attorney General believes that a State has not complied with USERRA, the amended version authorizes the United States to substitute for an individual service member as the plaintiff in enforcement actions. *Id.* § 4323(a). The federal district court has jurisdiction over such an action. *Id.* § 4323(b)(1). The venue provision was also amended in 1998. It now provides that "[i]n the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function." *Id.*§ 4323(c)(1). "In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business." *Id.* § 4323(c)(2). The Act, as amended, includes no venue provision for an action by a private person against a State (as an employer).

The legislative history of the 1998 amendments confirms that Congress intended that USERRA actions brought by individuals against a state be filed in state court. The expressed reason for these amendments was Congress' concern about this Court's then-recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), where the Court held that Congress may abrogate a state's sovereign immunity only when acting pursuant to its powers under § 5 of the Fourteenth Amendment, and not when acting pursuant to its Commerce Clause powers. *Id.* at 59, 72-73. Congress perceived *Seminole Tribe* to throw the validity of USERRA's abrogation of state sovereign immunity in doubt. *See* 144 Cong. Rec. H1398 (daily ed. Mar. 24, 1998) (Statement of Rep. Evans) ("[S]everal courts have held the reasoning of the

Seminole Tribe case precludes federal court jurisdiction of claims to enforce federal rights of State employees under the Uniformed Service Employment and Reemployment Rights Act (USERRA).").

H.R. 3213, the jurisdictional provisions of which survive in the current version of 38 U.S.C. § 4323, was introduced on the House floor on March 24, 1998. *See* 144 Cong. Rec. H1396-02 (1998); *see also* H.R. 3213, 105th Cong. (1998). The stated purpose of the bill was, in part, "to clarify enforcement of veterans' employment and reemployment rights with respect to a State as an employer." 144 Cong. Rec. at H1396; *see also* H.R. 3213. The summary of the bill in the Report of the House Committee on Veterans' Affairs provides further insight into Congress' intent:

> This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA. Since the Attorney General, through U.S. Attorneys, is already involved in enforcing this law, the enactment of H.R. 3213 will not impose any new duties on the Attorney General. *Individuals not represented by the Attorney General would be able to bring enforcement actions in state court.*

H.R. Rep. No. 105-448, at 2 (1998) (emph. added), *available at* 1998 WL 117158.

The House Report thus makes plain that the purpose of the bill was to solve the *Seminole Tribe* problem by (1) substituting the United States for the service member in suits brought against states in

federal court; and (2) directing actions brought by individual service members, who were not represented by the United States, to state court. *See* H.R. Rep. No. 105-448, at 2-5 (discussing the problems created by *Seminole Tribe* for USERRA's enforcement scheme and the proposed solution); *see also* 144 Cong. Rec. at H1398 (statement of Rep. Quinn) ("This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA. . . . Individuals not represented by the Attorney General would be able to bring enforcement actions in State court.")[8]

The court of appeals below relied on that legislative history to conclude that district courts lack jurisdiction over private USERRA claims against state employers. The Fifth Circuit recently reached the same conclusion, *McIntosh v. Partridge*, 540 F.3d at 320-21, as had the Seventh Circuit earlier. *Velasquez v. Frapwell*, 165 F.3d at 593-94.[9]

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[8] The recent Veterans' Benefits Improvement Act of 2008 bolstered veterans' rights under USERRA, but contained no provision to alter the cited holdings by the Fifth and Ninth Circuits of the previous several months. Pub. L. No. 110-389, 122 Stat. 4145 (enacted on Sept. 27, 2008, signed by the President on Oct. 10, 2008). Congress' presumed awareness of these rulings suggests that those appellate courts had adopted reasonable interpretations of the 1998 Amendments.

[9] Townsend errs in suggesting the presence of "conflicting case-law regarding changes made to USERRA in 1998" concerning any question presented to this court. Pet. at p. 8. Only one court has held that the 1998 amendments permit district courts to hear private USERRA claims against state employers. The district court's opinion in *McIntosh v. Partridge*, 2007 WL 1295836

Townsend's emphasis on "may" ignores not only this legislative history, but also the statutory text and structure, and background assumptions of jurisprudence. Congress' use of "may" in § 4323(b)(2) reflects appropriate congressional deference to the states' autonomy over the jurisdiction of their own courts.[10] It also indicates the range of remedial options available to a public employee. *See* 38 U.S.C. §§ 4322 (administrative complaint with the Secretary of Labor) and 4323(a)(1) (Labor Secretary's referral of complaint to Attorney General for Justice Department suit in federal court).[11] Use of "may" to recognize concurrent jurisdiction is superfluous.[12]

(W.D.Tex. 2007), was recently reversed by the Fifth Circuit. *Supra*.

[10] *Alden v. Maine*, 527 U.S. 706 (1999); *Townsend v. Univ. of Alaska*, 543 F.3d at 483, n.2.

[11] *See also Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000) (because federal jurisdiction is limited to that conferred by Congress, a statute stating that an action "may" be brought in state court "does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none"); *Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1022 (9th Cir. 2007) (a statute stating that a person "may" file an administrative complaint with the Secretary of Labor does not permit the person to elect to file a lawsuit in the district court).

[12] *Cooper Industries, Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 166 (2004). Thus, courts have rejected reading "may" to connote concurrent jurisdiction. *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 517 (3rd Cir. 1999); *Int. Science & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1151-52 (4th Cir. 1997).

This Court's comments on "may" in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), and *Grable & Sons Metal Products, Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308 (2005), do not point to a contrary result, because the statutory schemes in neither case presented the combination of repealed federal jurisdictional provisions and expressly designated state court jurisdiction that is present in USERRA. The statute examined in *Breuer* (the Fair Labor Standards Act) expressly provided that actions may be "maintained . . . in any Federal or State Court of competent jurisdiction,"[13] in contrast to USERRA, where Congress had, *via* the 1998 amendments to USERRA, *deleted* language conferring federal jurisdiction, and *substituting* language conferring state court jurisdiction over relevant USERA claims. *Grable & Sons*, in fact, counsels against broad readings of Section 1331 that would disturb "congressional judgment about the sound division of labor between state and federal courts . . ." 545 U.S. at 313, the result that would flow if Section 1331 were read to override Congress' 1998 trimming of federal court jurisdiction. The circuit courts that have interpreted USERRA have properly attended to the evolution of Congress' grants of USERRA jurisdiction, as well as to its use of antonyms.[14]

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[13] 29 U.S.C. § 216(b). *See Breuer*, 538 U.S. at 694.

[14] As discussed in the preceding paragraph, Congress did not use "shall" and "may" in oppositional senses in USERRA.

C. The 11th Amendment bars a private USERRA claim in federal court against a state employer.

The court of appeals held that Congress has not unequivocally expressed an intent to abrogate sovereign immunity against USERRA claims. 543 F.3d at 484-85. Townsend now argues that the War Powers Clause of Article I authorizes congressional abrogation even in the absence of an unequivocal statement.

1. Congress exercised no authority under the War Powers Clause over private/state claims in federal court.

While earlier versions of USERRA and its antecedents had relied on the War Powers Clause,[15] the 1998 Congress concluded that this Court's then-recent opinion in *Seminole Tribe* had rendered questionable its authority to abrogate state immunity from private USERRA claims.[16] While Congress's authority may not be limited to the constitutional provisions it expressly relies on, it may not rest on powers that it has clearly renounced.

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[15] *Diaz-Gandia v. Depena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); *Reopell v. Commonwealth of Mass.*, 936 F.2d 12, 15-16 (1st Cir. 1991).

[16] H. R. Rep. No. 105-448 (1998), 1998 WL 117158 **2-5; 144 Cong. Rec. H1397-99 (daily ed. Mar. 24, 1998) (Comments by Reps. Evans, Quinn, Filner & Gilman). With the hindsight afforded *by Central Virginia Comm. Coll. v. Katz*, 546 U.S. 356 (2006), the 1998 Congress may have underestimated its Article I authority to trim state sovereignty, though *Katz* is still insufficiently expansive so as to help Townsend.

Even if Congress could be credited with War Powers authority that it disclaimed, its undoubtedly broad authority under that Clause does not *require* it to confer jurisdiction on district courts over claims asserted by veterans, as Townsend suggests. Pet. at pp. 21-24. Congress retains the discretion to allocate or withhold jurisdiction as its judgment dictates. *Grable & Sons*, *supra*. Here, *via* § 4323(b), Congress has expressed its judgment that a category of USERRA claims may be filed only in state courts. No notion of sovereign immunity requires this Court to countermand that congressional judgment.

2. No historical pattern of state hostility to veterans supports congressional exercise of War Powers Clause authority.

Even if Congress had decided in 1998 to use War Powers authority, it lacked the evidentiary foundation for abrogating state immunity. That Congress (nor any other, to the University's knowledge) made no findings of a pattern of state violations of USERRA. The opposite is true, in fact.

> Although disputes between state agencies and employees about the scope and meaning of USERRA and its predecessor laws (commonly referred to as Veterans Reemployment Rights (VVR) laws) have arisen from time to time, state employers regularly afford persons serving in the Armed Forces and Selected Reserve the rights guaranteed by these laws.

* * *

> Given the lack of controversy surrounding the general subject of VRR, and the relatively good record of compliance by state agencies with the law as it existed at that time [1991 – 1994], it is not surprising to find very little discussion in the 1991 and 1993 committee reports about the remedies available to state employees.[17]

The absence of any evidence of state hostility to veterans is critical, because this Court has required such an evidentiary record of pre-statute discrimination to support congressional exercise of power against states under the 14th Amendment,[18] and has relied on extensive evidence of pre-1789 state hostility to debtor relief to support congressional exercise of power against states under the Bankruptcy Clause.[19]

Congress' evident satisfaction with the states' respect for veterans' rights, *supra*, undercuts Townsend's prediction of enlistment shortfalls. Pet. at

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[17] H. R. Rep. No. 105-448 (1998), 1998 WL 117158 *3 & **4-5 (emph. added).

[18] *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726-27 (2003).

[19] *Central Virginia Community College v. Katz*, 546 U.S. at 361. The *Katz* court also emphasized the limited (*in rem*) nature of Bankruptcy Court jurisdiction, *id.* at 369-70, which restricted federal intrusion into state interests. Federal court jurisdiction over private/state USERRA claims, in contrast, would permit the federal court to wield the entire panoply of remedial devices, including injunctions, reinstatement orders, liquidated damages, and attorney fees, as well as compensatory damages, outlined in 38 U.S.C. § 4323(c)(1).

pp. 7 & 25. Congress' continuing oversight of veterans legislation,[20] rather than judicial adoption of a strained reading of the 1998 amendments, offers the appropriate safeguard.

3. The constitutional structure does not evince the States' consent to federal court jurisdiction over War Powers Clause-supported legislation.

Nor is there any evidence that the states, during the drafting of the constitution, explicitly or implicitly consented to federal court jurisdiction over war or veterans-related claims against the states. For bankruptcy claims, the "uniform laws" envisioned by the constitutional drafters,[21] and the *in rem* nature of bankruptcy,[22] necessarily dictated exclusive federal jurisdiction. In contrast, the resolution of veterans claims requires the exercise of far more intrusive *in personam* jurisdiction, and is as easily accomplished in state court as in federal court. Congresses immediately following the constitutional convention did not propose or enact legislation "subordinat[ing] state sovereignty in the [War Powers] arena."[23] The War Powers Clause, thus, presents a substantially less compelling case for an inference that the original states agreed to subject themselves to federal court jurisdiction.

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[20] *See* n.8, *supra*.

[21] 546 U.S. at 366, 368.

[22] 546 U.S. at 369-73.

[23] 546 U.S. at 363.

Given the absence of any implied consent reflected by the constitutional structure, the absence of any pattern of state hostility to veterans, and the absence of any congressional intent to confer jurisdiction over these claims to federal courts, state arms such as the University retain their sovereign immunity from private USERRA claims in federal court.

4. Section 1331 does not abrogate the University's sovereign immunity.

Congress' targeted deletion of federal court jurisdiction over Townsend's category of USERRA claim, *supra*, trumps the generalized assertion of federal question jurisdiction in 28 U.S.C. § 1331. *See U. S. Dep't of HUD v. Rucker*, 535 U.S. 125, 134 n.2 (2002). Even more so, the generalities of Section 1331 are insufficient to unequivocally express congressional intent to abrogate state sovereign immunity. *Seminole Tribe*, 517 U.S. at 86 (Stevens, J., dissenting).

D. The availability of a private right of action under USERRA against individual public supervisors is not properly before this Court.

While Townsend, in his Conclusion, asks this Court to hold that USERRA permits suit against individual supervisor-employees, Pet. at pp. 25-26, he omitted that issue from his Questions Presented, *id.* at i, and did not brief it in the body of his Petition. Townsend has, thus, waived the presentation of this issue. Supreme Court Rule 14.1(a) (last sentence); 14(h); 14.4. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (failure to brief argument in Opposition to Petition waives the argument).

CONCLUSION

Townsend has not established any compelling reason for this Court to grant his Petition. Therefore, Respondent University respectfully requests the Court to deny the Petition.

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